

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 161 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE R.R.JAIN

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME-TAX

Versus

SHAH ENGG. CO.(INTERNATIONAL)

Appearance:

MR MANISH R BHATT for Petitioner

MR NR DIVETIA for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE R.R.JAIN

Date of decision: 25/07/96

ORAL JUDGEMENT

The Tribunal has referred the following question under Sec. 256 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") :-

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the deduction claimed by the assessee could be allowed granting

the deduction under section 35 B of the
Income-tax Act, 1961 ?"

2. The items for which the question pertains are the following items. The table hereunder indicates the amount spent in Kuwait Dinars and the clause under which weighted deduction is claimed by the assessee.

Details of Expenditure Amount (in Clause
 Kuw.Dinars) under
 which
 weighted
 deduction
 claimed

- 1) Goods purchased (for 74,656.206 35B(1)(b)
 works to be carried out (viii)
 in Kuwait)
- 2) Kitchen expenses for the 18,622.186 35B (1)
 labour at site (b)(viii)
- 3) Labour charges (for 1,23,031.780 -do-
 the workers executing
 the contract)
- 4) Interest and Bank Commission 1,409.873 -do-
 (being for guarantee bonds
 etc. incidental to the
 contract)
- 5) Insurance expenses 1,259.500 35B(1)(b)
 (iv) &
 (viii)

3. For the Assessment Year 1978-79, a return was filed on 29.6.1978 declaring nil income. It transpires from the record that the assessee entered into an agreement with the Engineering Project India Ltd. (Government of India Enterprise) for a part of the construction, work of dwelling houses and infrastructural work as sub-contractor in Kuwait and the work was carried out at Kuwait. The assessee firm had its office at Gandhidham (Kachchh). Out of 8 partners, 3 partners were managing the affairs of the firm and 5 partners were staying at Kuwait and were looking after the work of construction. Other partners who were at Gandhidham were rendering their services at Gandhidham for the business of the firm.

4. It appears that under Sec. 35 B of the Act, the assessee claimed weighted deduction for different items out of which some were disallowed by the Income Tax Officer. However, before us, the reference pertains to the items which are referred to hereinabove, and therefore, those items are required to be considered.

5. Section 35 B as in force at the relevant time is as under :

"35B. Export markets development allowance.- (1)

(a) where an assessee, being a domestic company or a person (other than a company) who is resident in India, has incurred after the 29th day of February, 1968, but before the 1st day of March, 1983, whether directly or in association with any other person, any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) referred to in clause (b), he shall, subject to the provisions of this section, be allowed a deduction of a sum equal to one and one-third times the amount of such expenditure incurred during the previous year :

Provided that in respect of the expenditure incurred after the 28th day of February, 1973, but before the 1st day of April, 1978, by a domestic company, being a company in which the public are substantially interested, the provisions of this clause shall have effect as if for the words "one and one-third time", the words "one and one-half times had been substituted.

(b) The expenditure referred to in clause (a) is that incurred wholly and exclusively on -

(i) advertisement or publicity outside India
in respect of the goods, services or facilities which the assessee deals in or provides in the course of his business.....:

(ii) obtaining information regarding markets outside India for such goods, service or facilities;

(iii) distribution, supply or provision outside India of such goods, services or

facilities, not being expenditure incurred in India in connection therewith or expenditure (wherever incurred) on the carriage of such goods to their destination outside India or on the insurance of such goods while in transit, where such expenditure is incurred before the 1st day of April, 1978 ;

(iv) maintenance outside India of a branch, office or agency for the promotion of the sale outside India of such goods, services or facilities ;

(v) preparation and submission of tender for the supply or provision outside India of such goods, services or facilities, and activities incidental thereto;

(vi) furnishing to a person outside India samples or technical information for the provision of the sale of such goods, services or facilities;

(vii) travelling outside India for the promotion of the sale outside India of such goods, services or facilities, including travelling outward from, and return to, India ;

(viii) performance of services outside India in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities;

(ix) such other activities for the promotion of the sale outside India of such goods, services or facilities as may be prescribed.

Explanation 1.- In this section, "domestic company" shall have the meaning assigned to it in clause (2) of Section 80 B.

Explanation 2.- For the removal of doubts, it is hereby declared that nothing in clause (b) shall be construed to include any expenditure which is in the nature of purchasing and manufacturing expenses ordinarily debitable to the trading or manufacturing account and not to the profit and

loss account.

(2) where a deduction under this section is claimed and allowed for any assessment year in respect of any expenditure referred to in sub-section (1), deduction shall not be allowed in respect of such expenditure under any other provision of this Act for the same or any other assessment year."

6. So far as item at Sr. No. 1 (Goods purchased for works to be carried out in Kuwait) is concerned, for which claim is made under Section 35 B (1) (b) (viii) is not admissible in view of the explanation 2 to section 35 B. The amount indicated is in the nature of purchase of articles and, therefore, the same is rightly held to be not allowable item for weighted deduction.

7. So far as the last 2 items are concerned, with respect to interest and Bank commission (being for guarantee bonds etc. incidental to the contract) and Insurance expenses, the assessee claimed under sec. 35 B (1) (b) (iv) & (viii) for weighted deduction. Reading the section, it is very clear that these items are not covered by the section.

8. So far as the expenditure incurred on payment of interest to the bank and the bank charges are concerned, it would not fall under any of the sub-clauses of clause (b) of Section 35 B(1). In the case of Isabgul Export Corporation vs. Commissioner of Income-Tax reported in 205 ITR 227, the Division Bench of this Court has expressed the view that such expenditure would not qualify for weighted deduction under Sec. 35 B. Even for expenses toward insurance, the same is the position and the Division Bench of this Court in the case of Testeels Ltd. vs. Commissioner of Income-tax, reported in 205 ITR 230 has expressed the view that the insurance expenses are not admissible for weighted deduction. In the aforesaid case, the Court has also expressed its view with regard to bank guarantee charges and keeping in mind these two decisions, items No. 4 and 5 would not fall within the scope of Sec. 35 B and it has been rightly held not to be allowable for granting weighted deduction under Sec. 35 B of the Act.

9. Rest of the two items at Sr. Nos. 2 and 3 pertain to kitchen expenses for the labour at site and labour charges (for the workers executing the contract), there is no dispute with regard to the expenses incurred

outside India at Kuwait. The assessee claimed weighted deduction under clause (viii) of Section 35 B (1) (b) of the Act. At site, i.e. at Kuwait, labourers were employed and the amount was spent at the site and it was with regard to the performance of services in connection with or incidental to the execution of the contract. In view of the reported decision of this Court in the case of Testeels Ltd. (Supra), it is rightly contended by the learned counsel for the assessee that the items ought to have been declared as allowable under Sec. 35 B of the Act. Our attention was also drawn to a reported decision of this Court in the case of CIT vs. Gaskets and Radiators Pvt. Ltd. reported in 192 ITR 509. It is clear that the expenditure incurred for performance of services outside India in connection with or incidental to the execution of contract as per clause (viii) of sub-section (b) has been established by the assessee, hence as per the provisions the weighted deduction is required to be granted. Therefore, for these two items, the assessee is entitled to claim weighted deduction under Sec. 35 B(1)(b)(viii) of the Act.

10 . Thus, we answer the question in favour of the assessee so far as items referred to at Sr. Nos. 2 and 3 (kitchen expenses for the labour at site and labour charges (for the workers executing the contract)), we answer the reference in favour of the assessee and against the revenue. With regard to the items referred to at Sr. Nos. 1, 4 and 5, the question is required to be answered in favour of the revenue and against the assessee. Answer accordingly with no order as to costs.
